

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

**RSA No.338 of 2018 (O&M)
Date of Decision.18.01.2018**

Raj Kumar

.....Appellant

Vs

Ishwar Devi

.....Respondent

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Ashish Aggarwal, Senior Advocate with
Mr. Govind Chauhan, Advocate
for the appellant.

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AMIT RAWAL J.(ORAL)

The appellant is in regular second appeal challenging the judgments and decrees passed by both the Courts below whereby the suit preferred by the plaintiff claiming the following relief, has been decreed:-

“Suit for declaration to the effect that the plaintiff is an owner in possession of land measuring 81 kanal 2 marla Khewat No.1541 kitat 1143 situated at village Bighar, Tehsil and District, Fatehabad, through registered Will No.470 dated 23.3.2009 registered in the office of Sub Registrar, Fatehabad. The said land is a release land of Smt. Durga Devi daughter of Roop Chand of Pokhar Dass resident of Basti Bhiwan Tehsil and District Fatehabad and the defendant has not any right with the said land. The oral Will dated 17.06.2011 in favour of defendant by Smt. Durga Rani daughter of Smt. Budha Bai wife if deceased Roop Chand is wrong, against law and based on fraudulent and misrepresentation and the said oral Will dated

17.06.2011 which was registered in the office of Sub Registrar vide deed No.337 dated 20.10.2011, after the death of Smt. Durga Devi is also wrong, against law, against facts, null and void and is liable to be set aside. The entry in the revenue record vide mutation No.9757 dated 20.10.2011 of the above land bearing 81 kanal 2 marlas of said Durga Rani in favour of defendant is also wrong, against law, against fact and is liable to be set aside. The plaintiff is entitled to get register the deed No.470 dated 23.03.2009 in her favour after setting aside the deed No.337 and mutation on the basis of the said deed. And further suit for permanent injunction to the effect that the defendant be restrained to sell the said land to any other person and from interfering and alienating and from creating any encumbrance over it on the basis of illegal mutation and entry in revenue record in his favour. On the basis of oral and documentary evidence of every description.”

The relief sought is preceded by pleadings that Durga Devi, daughter of Roop Chand, resident of Basti Bhiwan was sister of the plaintiff- Ishwar Devi, who was unmarried. She was owner in possession of the suit property. During her life time, she had been living and staying with the plaintiff. The plaintiff was having three other sisters namely Ram Pyari, Kalwati and Krishna. Durga Devi in her life time with her own free consent and in sound disposing mind executed a Will dated 23.03.2009 and bequeathed her entire movable and immovable property in favour of the plaintiff. At the time of execution of the Will, she was 50 years of age and the aforementioned Will was scribed by an Advocate in the presence of the

witnesses Sandeep Bhatia, Advocate, Daulat Ram Nambardar of village Bighar and Rajender Kumar son of Ved Parkash. She unfortunately died on 22.07.2011. Accordingly, the plaintiff became owner in possession of the land but could not get the mutation sanctioned in her favour on the basis of the Will *ibid*. However, in the month of May, 2012, a threat was extended by the defendant to dispossess the plaintiff from the suit property and on making enquiries came to know that mutation regarding the land was entered and sanctioned in favour of the defendant on the basis of Will bearing vasika No.337 dated 20.10.2011 and the aforementioned Will was challenged by filing suit on the grounds stated therein. Prime ground was that in the month of June, 2011, Durga Devi was ill and her eye sight was also weak. She was hard of hearing and the Will aforementioned did not bear the thumb impression of Durga Devi and if at all, thumb impression was there, they had been obtained under misrepresentation. All three sisters except plaintiff and mother of Durga Devi have already died and the plaintiff was the only legal heir whereas defendants are the nephews i.e. children of one of the sisters of Durga Devi. Many contradictions had been pointed out in the suit with regard to Will propounded by the defendants.

The aforementioned suit was contested by the defendants by taking various preliminary objections regarding the maintainability, concealment and locus standi. It was stated that the defendant is the son of elder sister of Durga Devi and she accepted the defendant as her own son during her life time as the defendant was assisting her for cultivation of land in dispute. The execution of the Will as set up by the plaintiff dated 23.03.2009 was denied and it was stated that in the month of March i.e. 06.03.2009, Durga Devi suffered a brain hemorrhage and was admitted in

the hospital till 13.09.2009 and therefore, there was no occasion for her to execute the Will few days thereafter as she was not in sound state of mind. Thus, the Will set up by the plaintiff was stated to have been surrounded by suspicious circumstances. It was further stated that all the rites and ceremonies after death of Budhan Bai i.e. mother of the deceased Durga Devi and maternal grand-mother of the defendant were performed by the defendant. Even the last rites of Durga Devi were also performed by the defendant as he had gone to Haridwar for performing the same. Both the parties at variance led evidence in support of their case, which had been referred in paragraph 7 and 8 by the trial Court. The Trial Court on the preponderance of evidence decreed the suit by upholding the Will dated 23.03.2009 propounded by the plaintiff and rejected the Will dated 17.06.2011 registered on 20.10.2011, propounded by the defendant and consequently, the mutation dated 28.10.2011 was also set aside.

The defendant assailed the judgment and decree passed by the trial Court before the lower Appellate Court, which discarded both the Wills and held that Ishwar Devi, being the sister of Durga Devi and Class I heir was entitled to inherit the property. It is in these circumstances the present appeal has been filed.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Govind Chauhan, Advocate while assailing the judgments and decrees of both the Courts below made the following submissions:-

- (i) The Courts below have given a contradictory finding qua Will dated 17.06.2011 (D1), particularly the lower Appellate Court in one breath held that the Will aforementioned was duly executed but in the other breath

discarded the same to be suffered by suspicious circumstances, which have not been explained.

- (ii) The Courts below have failed to consider Ex.D4 and D-5, affidavit of Panda of Haridwar as well as register of Panda, which proved on record that it was the defendant who had performed the last rites of Dayal Chand, maternal uncle, Budhan Bai, maternal grand mother and Durga Devi, being testator/*massi*.
- (iii) Death of Durga Devi occurred one month after the execution of the Will dated 17.06.2011 registered on 20.10.2011 was also not unnatural and therefore, the aforementioned Will cannot be said to be surrounded by suspicious circumstances. The report of Forensic Science Laboratory, Madhuban though stated that the thumb impression of Durga Devi on the Will dated 17.06.2011, Ex.D1, was faint and partial but the fact remains that the lower Appellate Court found that the appellant-defendant had complied with the provisions of Section 63 of the Indian Evidence Act and proved the execution of the Will through the testimony of the attesting witnesses, thus, urges this Court to formulate the substantial questions of law as drawn in the memorandum of appeal.

I have heard learned counsel for the appellant, appraised the paper book and of the view that there is no force and merit in the aforementioned submissions of Mr. Aggarwal. No doubt, the trial Court

gave finding with regard to the Will dated 23.03.2009 executed by Durga Devi in favour of the respondent-plaintiff but the same had been discarded by the lower Appellate Court, equally so the Will of the defendant has also been discarded on the premise that the same was referred to Forensic Science Laboratory, Madhuban for comparison with the standard thumb impression of Durga Devi. Plaintiff examined Multan Singh, Finger Expert, FPB(H), Madhuban as PW11, who proved his report dated 14.09.2012, Ex.PW10/A mentioning therein that the alleged thumb impression on the Will, Ex.D1 were not fit for comparison as disputed thumb impressions were not only faint but also partial. In view of the aforementioned fact, plaintiff made a challenge to the Will propounded by the defendant, which ought to have been discarded but the lower Appellate rightly observed that the Will propounded by the defendant was also surrounded by suspicious circumstances.

Concededly, the factum of the respondent-plaintiff being the sister of Durga Devi has not been denied, therefore, there was no occasion for the respondent-plaintiff to lead evidence qua relationship as per the provisions of Section 50 of the Indian Evidence Act. Schedule under Section 8 of the Hindu Succession Act has given the description of the legal heirs and in case the deceased dies issueless/unmarried, brothers and sisters would fall in the category of Class II heirs whereas the appellant-defendant is the nephew of the sister of Durga Devi. The import of the judgment rendered by the lower Court is on the basis of succession, meaning thereby, the estate of Durga Devi had to be devolved by way of natural succession and as a natural corollary, it would come within the kitty of respondent-plaintiff being Class II heir.

It is a matter of fact that an FIR bearing No.330 dated 27.07.2012 had been registered under Sections 420, 467, 471, 120-B IPC, but on enquiring status of the same from the senior counsel during the course of arguments, it has been brought to the notice of this Court that its investigation was kept in abeyance owing to the pendency of the suit but equally so, it was urged that now the police is in the process of arresting the defendant. The appellant-defendant failed to lead any evidence contrary to what has been brought on record by the respondent-plaintiff through testimony of PW11, Finger Expert from Madhuban to prove that the report was not as per the actual and factual aspect.

Mr. Aggarwal, during course of arguments laid down a strong emphasis upon the finding rendered by the lower Appellate Court in the concluding paragraph 27 that once it had been observed that the Will Ex.D1 had been proved through the testimony of witnesses, there was no occasion for the lower Appellate Court to render a finding against the appellant-defendant. I am afraid the aforementioned argument is not able to cut ice, for, the witness may tell lies but the report of the expert that too from a Laboratory of instrumentality of the State of Haryana cannot be ignored/discarded.

In order to buttress his arguments, he referred to Ex.D4, D5 and D6 to establish that the defendant had performed last rites of the maternal uncle, maternal grandmother as well as Durga Devi. In this regard, he drew attention of this Court to one of the documents Ex.D4, true translation copy of the same attached as Annexure A-2. This Court had occasion to examine the same and relevant content of the same pertaining to performance of the rites of Durga Devi reads as under:-

“5. That on dated 1.8.2011, the following entry has been referred in the Bahi.

Resident of Noorpur Bhima Basti, Fatehabad. The ashes of maternal aunt Smt. Late Durga Rani daughter of late Roop Chand were brought. The nephew Raj Kumar Narang son of Shri Sant Lal and grand son of Shri Hakam Ram Narang, Gada Tehal Singh has brought the same, Shri Raj Kumar Narang came to Shri Gangaji Haridwar along with ashes of his maternal aunt Late Durga Rani. He got performed Kirya Karam along with his cousin brother Gulsan Makija, date of death:22.7.2011 Friday at 9-10 O'clock. She was residing with Raj Kumar Ji. Sudhi 2 Samvat 2046. Certified copy of the Bahi is attached herewith.”

It is strange that a Panda who had given the certificate also certified that Durga Devi was residing with the appellant-defendant. The aforementioned statement, in my view, is an outcome of the information provided by the defendant to the Panda at the time of performing last rites of Durga Devi having a direct interest in the property. It nowhere surfaced that the said Panda was having any visiting terms with the defendant at his place of residence and therefore, he knew the factum of residence of Durga Devi with the appellant-defendant. Thus, the aforementioned document, in my view, is also surrounded by suspicious circumstance though the Courts below have not seriously pondered upon the same. Once the matter has been raised, it cannot escape my notice. In view of what has been noticed, even

Ex.D4 though emphatically relied upon by the appellant would not come to rescue.

For the reasons aforementioned, I do not find any reason for subscribing to the different opinion that the one arrived at by the lower Appellate Court, much less, no substantial question of law arises for determination by this Court. No ground for interference is made out. Resultantly, the second appeal stands dismissed.

(AMIT RAWAL)
JUDGE

January 18, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No